**EWE THUAN KHAY & TAN SUAK WAK**

**v.**

**MATHURAN NARAYANAN**

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CIVIL APPEAL NO: 12-109-94]
30 NOVEMBER 1995

***EVIDENCE:*** *Cross examination - Documents produced - Wage vouchers not challenged - Whether Court bound to accept fact of employment*

The deceased was fatally injured in a motor accident between the motor-cycle ridden by him and the lorry driven by the respondent. The appellants claimed *inter alia* for loss of support of the deceased, their son. The Sessions Court rejected the appellants' claim; hence this appeal.

At the material time, the deceased was 17 years old and a full-time student. The appeallants had adduced evidence that the deceased had at the time been working as a site clerk in a construction firm, and three wage vouchers were extended to establish this fact. It was contended by counsel for the appellants that as the evidence of the three wage vouchers had not been challenged in the Court below, the Court had to accept the evidence that the deceased had been employed on a monthly basis.

The witnesses for the appellants had, however, been cross examined during the trial as to whether the deceased had been employed although no express challenge was made to the three wage vouchers. The appellants contended that the Court had to accept the fact of employment as having been established in the face of the evidence.

**Held:**

**[1]** The cross examination and the answers given thereto showed that there was an unremitting challenge to the assertion that the deceased was employed by Fatt Construction. Since the fact of employment was never accepted, the documents produced to substantiate the employment stood equally challenged.

*[Appeal dismissed.]*

**Cases referred to:**
*Yeoh Cheng Han v. Official Administrator, Malaya [1972] 2 MLJ 7* ***(refd)***
*Pilai & Anor v. Indufela & Co & Ors [1980] 2 MLJ 176* ***(refd)***
*Wong Swee Chin v. PP [1981] 1 MLJ 212* ***(refd)***

*KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1* ***(refd)***
*Ah Mee v. PP [1967] 1 MLJ 220* ***(refd)***
*Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhjaya Pasukan Polis & Ors [1995] 1 CLJ 619* ***(refd)***

**Legislation referred to:**
Evidence Act 1950, ss. 91, 92, 114(g)

**Other sources referred to:**
*Black's Law Dictionary,* 6th Edn.

*For the plaintiffs - Brijnandan Singh; M/s Brijnandan Singh Bhar & Co*
*For the defendant - Ernest Theseira; M/s AJ Teoh & Co*

## JUDGMENT

**Jeffrey Tan J:**

This is an appeal against the decision of the Sessions Court, given on 8 August 1994, rejecting the appellants/plaintiffs' claim on the loss of support of their son (deceased), a minor, who was fatally injured in a motor accident between the motor-cycle ridden by the deceased and the motor lorry driven by the respondent. There is no appeal against the other findings of the Sessions Court.

At the time of his death, the deceased was 17 years old and a full time student (undisputed facts in the trial and in this appeal), hardly the age or station, most reasonably, for the deceased to have been a provider of monetary support to the appellants.

However, it was the testimony of the appellants in the trial below, and the trial was only to assess the damages, that the deceased was working in the afternoons, after school, as a site clerk in a construction firm – "Fatt Construction" – belonging to the 1st appellant (the managing partner) SP3 and one other, and that the deceased was earning RM400 a month. The appellants tendered to the Court below, to support their case on the loss of the deceased's support, the three wage vouchers now found in pp. 68-70 of the Appeal Record. According to the appellants and their witnesses, the vouchers in pp. 68-69 bear the signature of the deceased, whilst the voucher in p. 70 has the signature of the 2nd appellant, who received the deceased's wages on behalf of the deceased. It was furthermore the testimony of the 1st appellant that; (i) the deceased gave his entire wages to the 2nd appellant, "untuk kegunaan dan simpanan kerana dia hendak pergi menuntut di luar negeri", (ii) he did not know whether the money was used by the 2nd appellant, (iii) he did not use any of the money, and, (iv) he did not know whether the 2nd appellant saved any of the money for the deceased. On the wages of the deceased, the 2nd appellant's testimony was, "saya gunakan untuk saya sendiri,

juga untuk keluarga ... Bagi sendiri saya gunakan untuk beli pakaian. Bagi keluarga saya beli barang-barang runcit seperti sabun, powder dan juga untuk bayar bil letrik. Saya ada simpan sedikit duit yang simati beri pada saya". Under cross-examination, the 2nd appellant clarified, "Bagi wang yang diberi oleh beliau saya akan simpan untuk pelajarannya. Saya ada rancangan untuk menyimpan wang bagi masa hadapannya. Tidak tentu berapa saya simpan. Saya simpan yang baki selepas kegunaan saya. Saya simpan RM50 ke RM60 baki dari wang yang dia beri".

In the trial below, in the oral reply further to the written submissions, Counsel for the plaintiffs contended that those three vouchers were unchallenged evidence that the deceased was "paid on (a) monthly basis."

Picking up from that reply, Mr. Brijnandan Singh, for the appellants, contended that the deceased's employment and the three payment vouchers "were never challenged" and "when the evidence was not challenged it was not the duty of the (trial) Court to make out a case against the plaintiffs". There was, he said, "more than ample evidence beyond the probabilities ...". He further contended, "It was never put to the plaintiffs that the deceased was not employed". On the necessity to challenge the evidence on the employment of the deceased and the three vouchers, Mr. Brijnandan extended the authorities of *Yeoh Cheng Han v. Official Administrator, Malaya* [1972] 2 MLJ 7 (where the Federal Court bemoaned as pure conjecture the trial Court's finding that the plaintiff had lost control of his vehicle with extremely bad tyres, as "it was never put to the plaintiff that he had lost control because of the extremely bad tyres") and *Pilai & Anor. v. Indufela & Co. & Ors.* [1980] 2 MLJ 176 (where the absence of challenge in cross-examination contributed to the Court's acceptance of the plaintiff's version of the accident.)

Mr. Brijnandan also extended, and it is a most illuminative authority on the effect of a failure to cross-examine a witness, the Federal Court authority of *Wong Swee Chin v. PP* [1981] 1 MLJ 212. In *Wong Swee Chin,* one of the main grounds of appeal was that the trial Judge erred in law when he held that the failure of the defence to cross-examine the two prosecution witnesses on the ammunition actually found in the trouser pockets of the appellant at the time of his arrest constituted a clear admission of the charge of possession by the appellant. The Federal Court, per Raja Azlan CJ (Malaya) (as HRH then was) held;

> We consider that statement of the law as a misdirection. A correct statement of the law is that the failure of the defence to cross-examine the prosecution witnesses on that matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only to say there is a general rule

that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Gary* [1973] 1 NZLR 120 where Haslam J said at p. 122:

> In Phipson on *Evidence* 11th Edn. para. 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, *viz,* where
>
> ... the story is itself of an incredible or romancing character or the abstention arises from mere motives of delicacy ... or when Counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

Accordingly, it was urged upon this Court to rely on those vouchers. Mr. Brijnandan also commented that the respondent had an adjuster's report and that that report was not produced.

That latter comment probably promted Mr. Ernest Theseira, for the respondent, to make his opening remark that the adjuster's report was not relevant and that s. 114(g) of the Evidence Act 1950 should not be invoked. On the challenge to the deceased's employment and vouchers, Mr. Theseira contended that the respondent's challenge was unmistakable. PW3 was cross-examined on the deceased's employment, the deceased's pay and the relevant record of the deceased's pay, and was disbelieved by the trial Court. It was the finding of the trial Court, and learned Counsel was referring then to the grounds of judgment, (i) that the deceased was not gainfully employed and therefore there was no loss of support, and, (ii) that the appellants' evidence on the deceased's employment could not be believed, and those were not entirely unsupportable and should not be disturbed. Echoing the reasoning of the trial Court, Mr. Theseira submitted it was unlikely the deceased was working, as he was a full time student, in a regular school, in Form 5, and had parents with financial means. Devoting the rest of his submission to the evidence, Mr. Theseira contended that the vouchers were suspect (on this submission he extended the authority of *KPM Khidmat Sdn. Bhd. v. Teh Kim Suie* [1994] 3 CLJ 1) as, (i) the salary list, the account books and attendance card, and he said those documents would have given weight to the claim that the deceased was employed, were not produced, (ii) the vouchers did not reflect that cheques were drawn to pay the deceased even though it was the testimony of PW1 that the deceased was paid by cash cheques, (iii) the cheques were not produced, and, (iv) the appellants' witnesses "were inconsistent and contradictory of the others".

To that, Mr. Brijnandan's short reply was, "the inconsistency (in the evidence) in job of the deceased was because (the deceased) had various duties".

In an appeal, due importance is invariably given to a finding of a trial Court, in particular to a finding of fact, as a trial Court has the advantage of hearing and observing the demeanour of witnesses that an appellate Court has not. Therefore, an appellate Court is decidedly reluctant and indeed is slow to disturb a trial Court's finding unless the finding cannot be supported by the evidence or is wholly against the weight of the evidence. In the instant case, the trial Court held there was conflicting evidence on the work/duties of the deceased, that PW4 was of profligate character, and that PW4 was put forward to prop up the plaintiffs' case and not to speak the truth. The trial Court also doubted the veracity of the vouchers produced. In the concluding paragraph of its grounds of judgment, the trial Court expressed its skepticism and disbelief that the only son of a family of means, only 17 and still pursuing his studies and with parents who value education, would have been working.

Whether the trial Court's findings and conclusions were supported by the evidence is best answered by a review of the evidence.

PW1, the deceased's father, testified as follows. The deceased was working, since 1989, as a site clerk at Fatt Construction. His employer was PW3. The deceased was in school from 7am to 12.30pm, and at work from 2pm to 6pm. The deceased was drawing a salary of RM400 a month. He received his salary once every two or three months and he gave the entire sum to PW2.

Under cross-examination, PW1 testified as follows. Except for Bahasa Malaysia, the deceased passed all subjects in school. He was attending school at the Sekolah Menengah Jit Sin, the best school in Bukit Mertajam. He was studying in Form 5. He obtained a Grade B in the Lower School Certificate Examination. The deceased was his (PW1) only son. He would do his best for the deceased. He would give the best education to the deceased. He was prepared to spend on the education of the deceased. A good education was important for the deceased's future. Fatt Construction belonged to him (PW1) and PW3 (the majority partners) and he was the Managing Partner. He was drawing a nett salary of RM2,000. He was a sub-contractor and his income for the 10 to 15 years prior to 1990 was sufficient for the expenses of the family. In 1994, his income was RM15,000 a month. Fatt Construction employed a qualified accountant and maintained proper accounts. He supervised the work at site and had no knowledge of the accounts. PW3 paid the deceased by cash cheques. The deceased gave his wages to PW2 for PW2's use and also for PW2 to save as he wanted to pursue studies overseas. He did not know whether PW2 used the deceased's money. He did not use any of that

money. His income was sufficient for the expenses of his family. PW2 needed that money for household expenses. The family used the deceased's money.

To that testimony, the trial Court recorded without the reason the following comment, "Demeanour saksi ini tidak menyakinkan Mahkamah" (see p. 15B of the Appeal Record). Perhaps, the trial Court described the recalcitrant character in PW1's testimony. When PW1 was examined in chief, he said that PW3 was the deceased's employer. However, when he was cross-examined, he divulged that he and PW3 held the majority interest in Fatt Construction and that he was the managing partner, reasonably, facts that ought to have been with PW1 when he was giving evidence in chief on the employer of his son. Given that that divulgence was only made at the stage of cross-examination, and PW1 testifying on oath should have been forthright from the start that his firm employed the deceased, it must be asked if PW1 pointing to PW3 alone as the employer was attempting to distance himself from the employment of the deceased so as give some credibility, and it was sorely needed to support his claim – and it would not be intemperate to describe it as inherently improbable – that his minor son, a full time student of 17 from a family of means, was working and supporting his family when most reasonably it would not have been so.

There was also arrant contradictions in PW1's testimony. PW1 testified that he valued education, that a good education was important for the deceased's future and he was prepared to spend on the very best education for the deceased. Yet it was equally his testimony, and it cannot be reconciled with his respect for education and his concern for the future of the deceased, that the deceased was working each afternoon after school. The deceased would have to sit for the Form 5 examination, and his success or failure in that examination was crucial to the aspirations, be that of PW1 or the deceased, for further studies. Undeniably, the prospects of the deceased's success in his exams could not be enhanced by afternoons working as a site clerk at a work site. Indeed, the deceased working in the afternoons would be gravely handicapped, as he would be using up the time and energy that could be devoted to study – and so it should be, given that PW1 had plans for the further education of the deceased and those plans could not and would not be served if the deceased was working as a site clerk at the work site.

It was not as if indigent circumstances could force the deceased, perhaps, to take the mantle of responsibility. PW1 was the managing partner of his own business and he had a house and car. By his account, his income was sufficient for the expenses of his family; in 1990, his nett monthly income was RM2,000 whilst in 1994 his monthly income was RM15,000. There was no financial exigency therefore for the sacrifice of the deceased's time and energy as the

deceased's support was not needed. Yet PW1 could testify that PW2 needed the deceased's wages for household expenses and that the family used the deceased's wages, even though it was his testimony as well that his income was sufficient for his family and that the education of the deceased was important. Given that ambivalence and lack of candour in the testimony of PW1, the remark of the trial Court was not surprising at all.

PW1 was not the only parent who got his priorities all mixed up. PW2, the deceased's mother testified as follows. From 1989, the deceased was giving money to her every two or three months. The deceased was working as a pipe fitter and a site clerk. She used that money – "untuk saya sendiri dan juga keluarga" – to buy her clothes and the family's household needs and to pay the electricity bill. She saved some of that money.

Under cross-examination, PW2 testified as follows. The deceased was a good student. "Ya, kami adalah yang baik dan bahagia dan ambil berat tentang satu sama lain. Ya bapa anak saya akan buat sebaik-baiknya bagi pelajaran dan kebaikan anak beliau. Ya, bapa beliau akan buat sedaya upaya untuk memberi pelajaran yang setinggi-tingginya pada simati. Begitu juga itu saya. Ya, simati lulus dalam pemeriksaan SRP. Ya, jika dia lulus SPM saya akan sokong beliau untuk belajar seterusnya. Saya akan (bayar) pelajaran yang seterusnya dari gaji yang dia beri pada saya. Baki wang yang diberi oleh beliau saya akan simpan untuk pelajarannya. Saya ada rancangan untuk menyimpan wang bagi masa hadapannya. Tidak berapa saya simpan. Saya simpan baki selepas kegunaan saya."

When trial resumed on the adjourned date, PW2 retracted her prior testimony that the deceased was working as pipe fitter. But she also demonstrated she was not free from duplicity and evasiveness, as the following questions and answers in the transcript on the family income and the wages of the deceased so reveal;

Q: Suami awak kata pendapatannya bercukup untuk segala perbelanjaan keluarga awak?

A: Saya setuju

Q: Kalau begitu, dan memandangkan wang oleh anak adalah hard earned bagaimana boleh kata awak belanja hampir semua wang anak awak?

A: Saya gunakan wang itu untuk perbelanjaan rumah dan untuk seorang anak saya

Q: Kalau begitu awak atau suami awak bohong berkaitan dengan wang untuk perbelanjaan rumah?

A: Saya tidak bohong

PW3, the "employer" testified as follows. He was the manager of Fatt Construction. He was in charge of the workers and the payroll. The deceased was working as a "pekerja sambilan", and he was paid his wages, every two or three months, in cash, whenever he asked for his wages. The deceased signed the pay vouchers; the deceased signed P3A and P3B, while PW2 signed P3C after the deceased had passed away. There were other vouchers but it could not be located. He recorded the deceased's attendance on attendance cards but they could not be located. Except for public holidays and Sundays, the deceased worked each day of the month. The deceased was working 25 to 26 days a month. On occasion, the deceased even worked on Sundays. If the deceased was absent from work he would not be paid for the period he was absent. The deceased was earning RM400 to RM450 a month.

That latter testimony painted the deceased somewhat as a child laborer and not the scion of the managing partner of Fatt Construction. Anyhow, PW3's testimony under cross-examination reads as follows. That he and PW1 were holding a 60% interest in Fatt Construction. The deceased was working as a site clerk – "jaga ke sini, ke sana". When there was work, the deceased was working long hours, until 6pm to 7pm. Fatt Construction maintained proper records and proper accounts. The deceased's attendance cards were not thrown away; they could not be located. "Kerja simati macam bila ada bahan binaan sampai dia akan uruskan dan terima barang itu dan bil-bil itu dia akan serahkan pada kerani dia di pejabat. Itu sahaja kerja dia. Ya, simati bekerja di waktu petang sahaja." To the following question, "Jadi jika bahan pembinaan datang di sebelah pagi?", PW3 explained that he instructed the suppliers to deliver only in the afternoons, but in the event of a delivery in the morning the supplier would inform him beforehand, and at times he received the deliveries in the morning.

PW4, the "workmate" of the deceased testified as follows. On 3 December 1990, he was laying pipes at Taman Nagasari. He was working for Fatt Construction. The deceased was also working at Taman Nagasari – "jaga kuli dan jaga barang". He saw the accident. Under cross-examination, PW4 testified that he saw the accident, "dengan jelas" – "Kemalangan itu berlaku apabila motorlori yang datang dari jalan merah lori itu terus masuk ke jalan tar tanpa berhenti dan kemalangan berlaku. Dan motorsikal mari. Itu lori terus hentam dia bawa(h) motorsikal." He lodged a police report (p. 56 of the Appeal Record). He reported; (i) PW2 borrowed his motor-cycle (the motor-cycle ridden by the deceased) on 3 December 1990 and it was ridden by the deceased, and, (ii) he was informed at 3.30pm that his motor-cycle was involved in a motor accident with a motor lorry and that the deceased had passed away. The officer at the police station did not question him on the accident and he did not inform that he saw the accident. PW2 delivered food

to PW1 on 3 December 1990, and she borrowed PW4's motor-cycle to return home. The deceased was returning the motor-cycle – "Dia mari tengah jalan sudah berlaku kemalangan". Under re-examination, PW4 clarified it was not often that PW2 borrowed his motor-cycle.

But that testimony was riddled with appalling inconsistencies and of a very material nature. PW4's testimony that he witnessed the accident but did not report so and his account of the accident were contradictory of his contemporaneous report – lodged a day after the accident when the facts would have been alive – that he was informed of the accident and even then at 3.30pm, that is well after the accident; the driver of the motor lorry reported that the accident occurred at 1.40pm whilst PW1 reported that he was informed of the accident at 2.30pm. PW4's testimony that he did not report the accident he saw was also contradicted, as his report that he was informed of the accident at 3.30pm was his report of the accident. PW4's testimony was also highly questionable, as PW4 would not reasonably have reported he was informed of the accident at 3.30pm if he had witnessed the accident at about 1.40pm. More than just doubted, PW4's testimony, where it contradicted or varied his report that he was informed of the accident at 3.30pm, could have been excluded (see ss. 91 and 92 of the Evidence Act 1950 and *Ah Mee v. PP* [1967] 1 MLJ 220). Perhaps it was not excluded because liability was not in dispute and the specifics of the accident had lost its significance. Nevertheless, the exclusion of PW4's testimony, where it contradicted or varied his report, would only have been a disregard of the facts asserted and not the erasure of PW4's testimony, where it contradicted or varied his report, as PW4's testimony even where it contradicted or varied his report was relevant to Judge his consistency with his prior report; and in the instant case, PW4 who reported he was informed of the accident but testified that he witnessed the accident, was shown up to be of abandoned character.

The trial Court's findings that the witnesses testifying were not in agreement on the work of the deceased and that the veracity of the vouchers was doubtful were also not unsupported by the evidence. On the work/job of the deceased. PW1 testified that the deceased was working as a site clerk. According to PW2, the deceased was working as a pipe fitter cum site clerk. Later she testified that the deceased was only a site clerk. PW3, testified variously that the deceased was working as a "pekerja sambilan" and then as a site clerk. PW4 testified that the deceased was laying pipes at Taman Nagasari and also "jaga kuli dan jaga barang". Given that incertitude even on the basic description of the work of the deceased and the arrant inconsistencies in the testimony of the witnesses, there was little reason not to doubt the employment of the deceased. However, the employment of the deceased was doubtful not just because the witnesses had not accurately described the work/job of the

deceased and or their testimony was inconsistent or contradictory. Both PW1 and PW3 testified that Fatt Construction maintained proper accounts. Then in the usual course of things there would have been records of the EPF contributions and entries in the accounts books (was it not said that the deceased was employed since 1989?), documents that would support the claim that the deceased was employed. Yet that independent evidence, and it would be with Fatt Construction, the EPF Department or the auditors, was not produced. Perhaps, attendance cards and vouchers could be lost; but it could not be rationalised why that independent evidence and the cheques drawn to pay the deceased (the bank would have the cheques), that were within reach and would establish conclusively the employment of the deceased, if he was truly employed, were not produced. It could only be said that the cogent evidence on the employment was lacking.

Mr. Brijnandan submitted, "The voucher payments were never challenged. The receipt of RM400 per month was never challenged. P3A and P3B were never challenged. When the evidence was not challenged it was not the duty of the trial Court to make out a case against the plaintiffs." Well, it was the duty of the trial Court to evaluate the probability or improbability of the evidence on the employment of the deceased with a critical eye and with an inquisitive and analytical mind, as the employment/work of the deceased was hardly ever an undisputed and or uncontested fact.

Taking it from the beginning, the statement of claim had it that the deceased was working as a "pekerja sambilan" whilst the defence demanded strict proof of that employment and the loss of support. There was no doubt then, well, at least from the pleadings, that the plaintiffs were called on to prove that the deceased was employed as a "pekerja sambilan". Notice was given before hand that the employment was contested. And so there was the testimony from the plaintiffs and their witnesses that the deceased was employed as a site clerk, as a pipe fitter and site clerk, as a "pekerja sambilan" and then as a site clerk, to lay pipes and "jaga kuli dan jaga barang," and whatever. So too was an extensive cross-examination on the ongoing and future education of the deceased, the work/duties of the deceased, the salary of the deceased, the mode and the interval of payment of the salary, the income of the dependents, the plaintiffs' dependence on the deceased's salary, the payment vouchers produced and not produced, the attendance cards and the attendance of the deceased, PW1's interest in Fatt Construction, the accounts of Fatt Construction, and the need for the service of the deceased.

It must only be assumed that that cross-examination, and it was exhaustive, was not without purpose, as the employment of the deceased as an improbability was only shown up in cross-examination, and that improbability

would have been shown up, surely, if the defendant had not challenged or disputed the plaintiffs' assertion that the deceased was employed. Equally telling is the re-examination of PW2 and PW3; incidentally, PW2 testified, "saya pasti anak saya bekerja" and PW3 restified, "saya pasti simati bekerja". Need it be said that a re-examination is the examination of a witness after cross-examination and on matters arising out of such cross-examination (see *Black's law Dictionary* (6th Edn.). That being the case, then the employment of the deceased would have been in controversy during cross-examination, as reasonably, the testimony of PW2 and PW3 in re-examination that they were positive that the deceased was employed would have been totally unnecessary if the employment of the deceased was not put into question during cross-examination.

Fairly said, the answers given under cross-examination evince that there was an unremitting challenge to the plaintiffs' assertion that the deceased was employed by Fatt Construction, for it is apparent (from a transcript even without a record of the questions) that PW1 and PW3, and to a lesser extent PW2 and PW4, were sorely tested in cross-examination, and therefore challenged on their assertion that a school going minor was gainfully employed by Fatt Construction. Since the asserted employment of the deceased was never accepted, it must only stand to reason that the documents produced to substantiate the employment stood equally challenged, albeit obliquely (for an analogy, see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhjaya Pasukan Polis & 2 Ors.* [1995] 1 CLJ 619, where the Court of Appeal observed, per Gopal Sri Ram JCA, on the argument that the point under consideration was never raised by the plaintiff in his pleaded case, "that once the fairness of the procedure adopted was sufficiently raised and challenged, then all matters relevant thereto were put into issue without the need for a specific plea in that respect").

*Ex facie*, the deceased would have been a dependent of the appellants. That would not be an unreasonable assumption. *Actori incumbit probatio,* the burden was on the plaintiff to prove on a balance of probabilities that the deceased was a provider. In the circumstances of the instant case, proof of that employment was a *sine qua non.* The trial Court found that proof wanting, and a review of the evidence has not furnished any reason to disturb that finding. Rather that dialectic exercise vindicates the trial Court's findings and conclusions.

For the reasons in this judgment, the appeal is dismissed with costs.

*Reported by Pushpa Nair*